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IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973
No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
*Appellant*

v.

DEPARTMENT OF REVENUE,
*Appellee*

ON APPEAL FROM THE WASHINGTON
STATE COURT OF APPEALS, DIVISION II

# BRIEF OF APPELLEES

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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## QUESTION PRESENTED

Does a state tax imposed on the privilege of engaging in the business of making sales at wholesale within the taxing state measured by gross receipts from sales of products delivered in the taxing state from out-state sources, violate the Commerce and Due Process Clauses where the taxpayer is a foreign corporation which conducts substantial sales activities in the taxing state (1) by visiting out-of-state employees and (2) by maintaining in the taxing state a resident sales employee (a) who operates out of an office in his home, (b) who maintains virtual daily contact with the taxpayer's only significant customer

in the state, and (c) whose activities are related solely to and are decisive factors in establishing and maintaining the market for the sales by which the tax is measured?

## STATEMENT OF THE CASE

A. **Nature of the Case.** This is an appeal by Appellant, Standard Pressed Steel Co. (hereinafter referred to as Standard) from a final judgment of the Washington Court of Appeals, sustaining the assessment of Washington's business and occupation tax on persons "engaging within the state in the business of making sales at wholesale." RCW 82.04.270.[1] The tax was measured by the unapportioned gross receipts of Standard resulting from sales of industrial and aerospace fastener systems manufactured by Standard in Pennsylvania and California and sold to customers located in Washington, principally The Boeing Company (hereinafter referred to as Boeing), during the period January 1, 1965, through June 30, 1969 (A. 3).

B. **Business of Standard.** Standard is a Delaware corporation with manufacturing facilities located in Jenkintown, Pennsylvania and Santa Ana, California (A. 14, 77). Among other things, it manufactures highly specialized industrial and aerospace

[1] This is the same tax that was before this court in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). See also RCW 82.04.220, the general imposition section, which l ..es the tax on persons "for the act or privilege of engaging in busi..ess activities." Other sections, such as RCW 82.04.270, set the rate for each category of business activities.



fastener systems (nuts, bolts and rivets generally [A. 90, 91, Ex. B]). Its principal customer in Washington is Boeing (A. 77, 78).

C. **Activities of in-state personnel.** During the early part of the period in question, Standard maintained a sales office in Seattle (A. 4, 81). On February 11, 1966, this office was closed and thereafter the company had only one employee permanently located in the state, Mr. Robert H. Martinson (hereinafter referred to as Martinson), a Washington resident, with the job title of "Sales Engineer" (A. 76). Martinson had a college degree in animal husbandry (A. 76). In training for his job Martinson spent time at Standard's plants learning how the products were made and the general technology of the products A. 77). His supervisor was the "sales manager", and his typing was done by the sales manager's secretary (A. 79).

In his home Martinson had a desk, file, and telephone which he used as his office (A. 70), and for which he took a federal income tax deduction. The telephone was listed under Martinson's home address, but was used by Martinson in the conduct of his business (A. 80). Standard also maintained an answering service in the Seattle area which received calls for Martinson (Ex. K, A. 79, 80). Martinson confined his activities exclusively to representing Standard in its relation with Boeing, his superiors being of the view that other Washington customers did not

generate enough business to make it worth his time A. 77-78).

On the job Martinson worked directly with Boeing design engineers, standards engineers, and project engineers (qualifications engineers) (A. 76-77). The majority of his duties fell into two general categories: (1) the qualification process and (2) the problem solving process (A. 76). The record is silent concerning any other duties except "public relations" and obtaining sales information.

1. **Martinson's qualification activities.** In order to sell its products to Boeing, a supplier must first qualify as an "approved source". In the words of Martinson:

> "Well, anything you manufacture for Boeing, you have to have qualified at the Boeing source. Boeing determines who will be a supplier of theirs by qualifications done here in the Seattle area." (A. 85)[2]

Martinson spent approximately 80-90 percent of his time on this qualification process (A. 94). In working with Boeing's engineers Martinson would become informed that Boeing was considering a certain fastener system (A. 76, 89). He would issue a products engineering request describing in necessary detail Boeing's specifications and would send the information to Standard's chief engineer in Santa Ana, California (Ex. J, A. 89). If Standard wished to "qualify" for Boeing's list of approved sources,

[2]The wisdom of this Boeing policy is apparent, especially with regard to such critical products as the nuts, bolts, and rivets which hold Boeing's aircraft together.



*i.e.*, become a supplier, samples were made and shipped directly to Boeing for qualification tests (Ex. D, A. 85). Martinson would work with Boeing's engineers on qualification problems to make certain Standard was a qualified source; and he would then notify his superiors if Standard had so qualified (Ex. B, A. 84-85).

2. **Martinson's problem-solving activities.** Once a product had qualified and had been purchased by Boeing, Martinson would work with Boeing's engineers with respect to any problem with the product. The problem-solving process was handled in much the same way as the qualification process. Martinson would inform himself of any problems Boeing was having with the product and report his findings to Standard's engineers, who would in turn come up with proposed solutions and forward these to Martinson for his presentation to Boeing's engineers (A. 82-83).

3. **Miscellaneous activities of Martinson.** Martinson informed his superiors of the job responsibilities and phone numbers of Boeing's purchasing specialists and control buyers of each commodity for which Standard had qualified as an "approved source" and organizational information pertaining to Boeing (Ex. E, F, G, H, I, A. 87-89).[3] Martinson would also set up meetings with Boeing engineers and visiting

[3]Martinson explained the purpose of furnishing this information as follows:

> Boeing goes through so many reorganizations, and changes locations so many times, and personnel, you deal with specifics. These pieces of correspondence try to tell our people which people are now handling certain products." (A. 87)

groups of Standard's engineers. These visiting engineers were application, coding and general engineers who visited Boeing about three days every six weeks to discuss problems relating to the use of Standard's products in aircraft Boeing was building (A. 80-81).

In addition to his specific product oriented activities Martinson performed public relation services, such as the arrangement for a hospitality room for a meeting of the Society of Aerospace and Process Engineers, which included Boeing engineers (Ex. C, A. 85-86). All expenses were sent directly to the home office (A. 94).

D. **Activities of visiting personnel.** Application, coding and general engineers visited Boeing approximately three days every six weeks (A. 80, 81). A majority of their time in Washington was spent on working on engineering problems (A. 80). The nature of their visits was "to discuss problems in bolts or bolting material or codings in conjunction with the airplane that Boeing was building" (A. 81). The record does not disclose whether or not the visiting engineers performed any other services.

E. **Mechanics of order, acceptance, and delivery.** After Standard had successfully qualified its fasteners, it would become an "approved source" and Boeing would then enter into negotiations for purchase of the fasteners (A. 88-89, 93-94). All such dealings and negotiations were carried on between Boeing and Standard's out-of-state offices (A. 88-89, 93-94). Martinson neither placed nor accepted orders; Boeing placed its orders directly (A. 94). Standard, through its out-of-state offices, negotiated price and delivery date, accepted orders, handled shipments and invoicing, and collected payments (A. 14-15, 93). No inventories were kept in this state (A. 93). Deliveries were made by Standard directly through a common carrier (A. 93).



Martinson was not directly involved in the actual mechanics of order, acceptance, and delivery (A. 17, 94). However, Martinson did supply the sales manager and other personnel of Standard with lists of competitors (Ex. B), and a list of competitive prices at Boeing with an evaluation of factors involved in Boeing's purchasing decisions (Ex. L).

F. **Proceedings below.** Subsequent to the Department of Revenue's determination that the business activities of Standard in Washington were sufficient to support the assessment of the B&O tax here in question (A. 3-12), full independent review was conducted by three appellate tribunals—the Washington State Board of Tax Appeals (A. 13-22); Thurston County Superior Court (A. 26-31); and the Washington Court of Appeals, an intermediate appellate court (A. 33-42). A petition for further review of the Department's determination was denied by the Washington Supreme Court (A. 71).

Judicial review was conducted by the lower courts on a *de novo* basis (A. 26, 34), with each reviewing court looking at the facts of the case as revealed by the entire record. In each instance the

reviewing courts found *as a matter of fact* that Martinson's activities carried on in Washington on behalf of Standard were necessary in order that Standard could:

> "(1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they are responsible for the use of the personnel at the plaintiff's home office." (A. 27, 37)

The Court of Appeals found that the above activities were "substantial services" constituting a "peculiarly local activity" so as to support the imposition of the B&O tax on the privilege of engaging in a local business (A. 38). The Court of Appeals further found that these local activities

> "* * * were instrumental in establishing and maintaining The Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure the tax." (A. 40)

Accordingly, the court reasoned on authority of *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), and *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) that the gross proceeds of sales to Boeing were reasonably related to Standard's wholesaling in-state activities constituting the incidents of the tax and therefore the Commerce and Due Process Clauses were not offended by the imposition of the tax, measured by such sales.



## SUMMARY OF ARGUMENT

This appeal involves a determination by this Court of the significance and the effect of Standard's wholesaling activities in Washington, in reference to the limitations placed on Washington's power to tax such activities by the Commerce and Due Process Clauses of the federal constitution. The tax in question is the same tax involved in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). The basic question at issue is whether or not this cause is factually distinguishable for constitutional law purposes from *General Motors*. It is Washington's position that the tax in question is valid under the controlling principles set forth in that decision.

Standard's sole defense to liability for the tax in question is that the otherwise supportable factual and legal conclusions of the Court below are erroneous because its activities in Washington were de minimis and no different from the activities of the engineers in *Norton v. Department of Revenue*, 340 U.S. 534 (1951). This reed-like argument of Standard is based upon at least three fundamental errors, namely: (1) an incomplete statement and a misconstruction of the significance and operative effect of the facts pertaining to its wholesaling activities in Washington; (2) a misstatement of the facts in

*Norton* pertaining to Norton engineers and unsupportable inferences concerning the nature and extent of Norton's engineers' activities in Illinois concerning the exempt Norton sales; and (3) an erroneous interpretation and application of rules of law established in the *Norton* and *General Motors* decisions.

A comparison of facts in this case with the facts in *Norton* pertaining to the exempt Norton sales demonstrates that Standard erroneously relies on *Norton*. There is not one scintilla of evidence in the record in *Norton* nor any statement by either the Illinois Supreme Court in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) or this Court in *Norton* which establish that the Norton engineers had anything in fact to do with the exempt sales. Furthermore, in the instant case, Martinson was not an engineer giving technical engineering advice. He was a "salesman" responsible to the sales manager, and was engaged in activities to directly promote sales to Boeing in Washington. Standard's technical engineering services to Boeing were performed by visiting engineers.

In distinguishing *Norton* as to exempt sales, the Court below made significant factual findings and conclusions. Without challenging these findings of fact and conclusions concerning the significance and operating effect of its in-state activities, Standard simply argues on authority of *Norton* that as a matter of law the lower Court could not have found that the tax was imposed on the act or the privilege of



doing a local business and could not have properly determined that its in-state activities in Washington were instrumental in establishing and maintaining Boeing as a market for the sales in question. Inasmuch as this argument is not supported by a comparison of the facts in this cause with the facts pertaining to the exempt sales in *Norton*, this Court's decision in *Norton* is not precedent for Standard's claimed exemption.

In asserting that *General Motors, supra*, is controlling precedent here, the State recognizes that a local privilege tax measured by gross receipts is "suspect" under both the Due Process and Commerce Clauses. Nevertheless, when a tax such as the tax in question is imposed in conformity with the constitutional standards set forth in *General Motors*, it should be upheld.

These requirements have been met in the case at bar. First, the in-state activities of Standard are sufficient to establish its "presence" for purposes of the exercise of state jurisdiction. Standard, just as General Motors, carried on sales activities in Washington by means of resident employees operating out of offices in their homes. As an initial matter, this constitutes sufficient presence to support the exercise of state jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Field Enterprises, Inc. v. Washington*, 47 Wn. 852, 289 P.2d 1010, aff'd *per curiam* 352 U.S. 806 (1956); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

Second, once a taxpayer is jurisdictionally present in the state, due process requires that the activities manifesting this presence constitute "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344, 345 (1954) (quoted with approval in *General Motors, supra*, 377 U.S. at 448.). In applying the "minimum connection" test to the tax in question, *General Motors* teaches that: (1) "we look to the taxpayer's business activities within the state, i.e., local incidents, to determine if the gross receipts from the sales therein may be fairly related to those activities," 377 U.S. at 441; (2) the in-state activities must constitute "substantial services * * * with relation to the establishment and maintenance of sales, upon which the tax was measured," 377 U.S. at 447; and (3) the activities bear a substantial relation to the establishment and maintenance of sales, upon which the tax is measured, if they are "decisive factors in establishing and holding this market," 377 U.S. at 448. These due process requirements are qualitative and not quantitative. It is the purpose and effect of these in-state activities which control. The courts below found, and there is ample support in the record for such a finding, that Standard's activities in Washington meet these requirements. While differing as to detail and quantity, Martinson's in-state activities and that of visiting personnel are not qualitatively distinguishable from the activities of General Motors personnel in regard



to the wholesale sales at issue in *General Motors, supra.*

Third, the Commerce Clause requires that the tax in question (imposed on the act or privilege of conducting a wholesailng business in Washington) be imposed on a local business and not on the privilege of engaging in interstate commerce. In resolving this question in *General Motors, supra*, this Court held that the tax in question was not on the privilege of engaging in interstate commerce, but rather was on "local incidents as the State can reach", 377 U.S. at 447, and constituted a "fair demand for that aspect of interstate commerce to which it [the taxing state] bears a special relation." 377 U.S. at 440. The mere fact that the mechanics of the sales were conducted in interstate commerce did not convert the local activities of General Motors' sales personnel into activities in interstate commerce. As in *General Motors, supra*, the *decisive activities* which enabled Standard to utilize Boeing in Washington as a market were localized in Washington and were intrastate in nature. It is these activities which constitute the local business and establish the "special relation" of Washington to the wholesale sales in question, permitting the state to measure the tax by gross receipts derived from such wholesale sales. *General Motors, supra.*

Fourth, the Commerce Clause requires that a state tax cannot discriminate against, or impose multiple burdens upon, interstate commerce. In this case,

no argument has been made that the tax in question discriminates against interstate commerce. The tax applies equally to all wholesale businesses in the State of Washington. Furthermore, Standard has not met the burden imposed upon it by *General Motors, supra*, to establish that the tax in question is unconstitutional because its wholesale sales in Washington are subject to a multiple tax burden. In resolving the multiple tax burden question this Court has refused to deal in abstractions (*General Motors, supra*). Where local nexus exits, it has upheld the destination state's power to tax receipts from interstate sales, [*General Motors, supra; Field Enterprises, Inc. v. State*, 352 U.S. 806 (1956); *Norton Company v. Department of Revenue*, 340 U.S. 534 (1951); *McGoldrick v. Berwind White Coal Mining Co.*, 309 U.S. 33 (1939)] and denied the state of origin the power to tax receipts from interstate sales. [*Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Freeman v. Hewit*, 329 U.S. 249 (1946); *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Evco v. Jones*, 409 U.S. 91 (1972)]

Finally, consistent with the foregoing Due Process and Commerce Clause limitations, this Court has required interstate commerce to pay its own way. *General Motors, supra*, 377 U.S. at 439 (and cases cited therein). Barring any problems of insufficient nexus, discrimination, or multiple burdens, "[e]ven interstate business must pay its way." *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252 (1919), (quoted with approval in *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254 (1940), and *General Motors, supra*, 377 U.S. at 439). To strike down the tax in question would be in violation of this principle and would require Washington to subsidize Standard's Washington business.



In the last analysis, Due Process and Commerce Clause requirements are met if the state tax constitutes a fair demand for the benefits, privileges, and opportunities afforded the taxpayer by the taxing state. *Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940).

## ARGUMENT

### A. Introductory Considerations

Standard here, as did General Motors in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), challenges the tax in question under both the Commerce and Due Process clauses of the federal constitution. Claimed constitutional immunity from state taxation in each instance poses factual questions to be resolved pertaining to the nature and extent of in-state business activities as related to the subject of taxation and its measurement. The initial inquiry is whether or not Standard was "present" in the state of Washington for due process of law purposes during the period in question. Once this is established, the further question under the Due Process Clause is whether "the taxing power exerted by

the state bears fiscal relation to the protection, opportunity and benefits given by the state. The simple but controlling question is whether the "state has given anything for which it can ask return." *Wisconsin v. J. C. Penney*, 311 U.S. 435, 444 (1940) The question under the Commerce Clause is what portion of an interstate business may appropriately be attributed to the taxing state as a result of the local business activity in the state. *General Motors Corp. v. Washington, supra.*

Once it is determined that a taxpayer is present in the state in a constitutional due process sense, the principles and concepts embodied in otherwise applicable due process limitations and interstate commerce limitations are closely related and overlap to a considerable degree. *Ott v. Mississippi Valley Barge Line*, 336 U.S. 169 (1949); *National Bellas Hess Inc. v. Department of Revenue*, 386 U.S. 753 (1967); *Norfolk and Western Ry. Co. v. Missouri State Tax Comm.*, 390 U.S. 317 (1969). These requirements are generally met if the state has exerted its taxing power on and in proportion to the taxpayer's in-state activities and the "consequent enjoyment of the opportunities and protections which the state has afforded." *General Motors, supra*, 377 U.S. 436 at 441.

In order to avoid duplication of the arguments pertaining to substantive due process (the "association" test) and interstate commerce the substantive due process argument and the interstate commerce



argument (except for the multiple burden question) will be considered together. It is self-evident that if the Washington tax in question is imposed on local activities (incidents) and is measured by receipts reasonably attributable to these local activities both due process and interstate commerce requirements are met.

### B. The In-state Activities of Standard Pressed Steel are Sufficient to Establish a Constitutional Due Process Nexus.

The threshold constitutional question is whether Standard, by reason of its local activities carried on by Mr. Martinson and visiting personnel, has had sufficient contact with the state of Washington to confer, as a matter of due process, jurisdiction to impose a tax measured by gross receipts from sales derived from these local activities.

Historically under the Due Process Clause the touchstone of a state's jurisdiction over a person or property has been grounded on physical presence within the territorial jurisdiction of the state. *Pennoyer v. Neff*, 95 U.S. 714 (1878).[1] Over the years the requirement of actual physical presence has given way to the requirement that if a person be not present within the territory of the state, he have cer-

[1] In case of a corporation which, unlike an individual, may be "present" in more than one state, its presence in a particular state can be manifested only by activities carried on in its behalf by its agents or employees. Thus, in order to determine whether a foreign corporation is "present" within a state, the courts have traditionally looked to the nature and extent of the activities of the corporation carried on by its agents and employees within the state. *International Harvester v. Kentucky*, 234 U.S. 586 (1914); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Scripto v. Carson*, 362 U.S. 207 (1961).

tain minimum contacts with it so that the exertion of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

In the area of state taxation of an interstate business, these "traditional notions of fair play and substantial justice" have been embodied in the oft repeated question of "whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney, supra*, 311 U.S. 435, 444. Stated otherwise, does a foreign corporation have sufficient contact with the state in order that "the taxing power exerted by the state bear[s] fiscal relation to the protection, opportunities and benefits given by the state." (*Ibid.*, 311 U.S. at 444) In the last analysis, "due process requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344, 345 (1954).

In applying the due process test, this Court has held that the local warehousing of goods and maintenance of a local repair station to repair the taxpayer's products were sufficient for imposition of a privilege tax measured by capital stock. *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147 (1918). This Court futher has held that maintenance of resident salesmen and local sales offices in the taxing state constituted sufficient due process presence for imposition of a net income tax [*Northwestern States*



*Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)] and the Washington business and occupation tax measured by gross receipts [*Field Enterprises, Inc. v. State of Washington*, 47 Wn.2d 852, 289 P.2d 1010, aff'd. per curiam, 352 U.S. 806 (1956) and *General Motors v. Washington, supra.*] Continuous and systematic local solicitation of sales by the taxpayer's resident agents was held sufficient connection for use tax collection purposes. *Scripto v. Carson*, 362 U.S. 207 (1960).

These cases stand for the proposition that a state can exert its taxing jurisdiction over a foreign corporation if the foreign corporation has manifested its presence in the taxing state by means of maintaining resident employees or property therein, devoted to the business purposes for which entry was made. Implicit in the above cited cases is the understanding that by reason of maintaining resident employees or property in the taxing state the foreign corporation has generally availed itself of the "protection, opportunities and benefits given by the state." *Wisconsin v. J. C. Penney, supra.*

An examination of the nature and extent of Standard's activities in the state of Washington leaves no doubt that its activities in Washington were sufficient to support, as an initial matter, the exercise of tax jurisdiction. During the early part of the tax period in question, Standard maintained a sales office in Seattle. Subsequently, it maintained a resident employee who operated out of a sales

office in his home. This is a distinction without a difference.[8]

In addition, the company maintained a telephone listing and answering service in the state to facilitate local contact with its employee and its customers. Out-of-state employees were sent into the state on a regular and systematic basis to consult with Boeing and the resident salesman in regard to the use of its products. And finally, Standard's resident employee maintained continuous and systematic contact on virtually a daily basis with Boeing (Standard's only significant customer in the state) in furtherance of the business purposes of Standard.

The Washington B&O tax at bar is a tax on the business of making wholesale *sales* in Washington, *i.e.*, a tax on the act or privilege of exploiting the Washington market as a wholesale seller. Here, Washington has provided a market for Standard's products. Through its system of laws, bolstered by access to its courts, the state has provided, at considerable expense, certainty and order to the conduct of the market, without which it would be impossible to engage in any business transactions above the level of a "barter economy". The state, through its tax on the act or privilege of engaging in the business of making sales, is merely asking Standard to bear part of the cost of providing the services necessary to

[8] As was said in *General Motors Corp. v. Washington*, 377 U.S. 436, 447:

"We place little weight on the fact that these divisions had no formal offices in the State, since in actuality the homes of these officials were used as corporate offices. Despite their label as 'homes' they served the corporation just as effectively as 'offices.'"



maintain certainty and order in the market, in order that it and other sellers may exploit the market and obtain the maximum benefits and opportunities from their transactions. *Wisconsin v. J. C. Penney, supra.*

Clearly, under the principles set forth in *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450 (1959), *Field Enterprises, Inc. v. Washington*, 352 U.S. 806 (1956), *Scripto v. Carson*, 362 U.S. 207 (1960), and *General Motors Corp. v. Washington, supra*, the activities of Standard carried on in Washington were of sufficient magnitude to manifest corporate presence in Washington sufficient to support the exercise of its taxing jurisdiction consistent with the minimal requirements of due process.

C. **Standard Has the Burden to Establish (i) Its Claimed Tax Immunity; (ii) That the Findings of Fact of the Court Below are not Supported by Substantial Evidence (iii) That its In-state Activities are Disassociated from its Wholesaling Sales to Boeing in Washington.**

As stated in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951):

> "The general rule, applicable here, its that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.
> "This burden is never met by showing a fair difference of opinion which as an original matter might be decided differently. * * *"
> (340 U.S. at 537-538)

Standard in substance is challenging the findings of fact of the lower court. This Court, however,

will not overturn these findings of fact if they are "supported by substantial evidence".

In *Norton*, *supra*, 340 U.S. at 538, this Court stated:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

This doctrine was reaffirmed fourteen years later when the above language was quoted and followed in *General Motors Corp. v. Washington*, *supra*.

As a substantive matter, in order to meet these burdens of proof once it is established that Standard is jurisdictionally present in the state for Due Process and Commerce Clause purposes (conducting a local business), it must disassociate its in-state activity from the local taxable incidents and the receipts used to measure the tax. As stated in *American Oil Co. v. Neill*, 380 U.S. 451, 457 (1965):

> "* * * When a tax is imposed on an out-of-state vendor, 'nexus' between the taxing state and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co. v. Maryland*, *supra*, 347 US at 344-345. Granted that when a corporation, pursuant to permission given, enters a state and proceeds to do local business the 'link' is strong. In such instances there is a strong



> inference that it exists between the state in transactions which result in economic benefits obtained from a source within the state's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with the out-of-state sales. In such instances, the transactions are said to be 'disassociated from the local business,' *Norton Co. v. Dept. of Revenue*, *supra*, 340 US at 537, and therefore may not, consistent with due process be taxed."

Standard has not met these burdens of proof. It would escape taxation here by characterizing its Washington activities as *de minimis* and no different from the activities of Norton's engineers in reference to the sales held exempt in the *Norton* case, *supra*.[*]

In this manner, Standard attempts to circumvent the specific holdings of this court in *Norton*, *supra*, and *General Motors*, *supra*, (i) that it must show that the findings of fact of the court below are not supported by substantial evidence and (ii) that once it entered Washington to conduct local activities here to promote the sales of its products to Boeing, it must establish that these activities were disassociated from the incidence of the Washington tax and were not decisive factors in establishing and

[*]Standard argues, as a matter of law, that the court below could not conclude (i) that its activities in Washington constituted local incidents sufficient to uphold the tax in question and (ii) these activities were instrumental in establishing and holding the Washington market for its sales to Boeing because this court found comparable activities in *Norton*, *supra*, to be insufficient for these purposes. As indicated *infra* at pages 38-42 neither the *Norton* record nor the *Norton* decision support this argument.

holding Boeing as a market for its Washington sales to Boeing.

D. **Under the Controlling Principles Set Forth in General Motors, supra, and Norton, supra, the Tax in Question Has Been Validly Imposed on Standard's In-state Activities of Wholesaling Measured by its Wholesale Sales to Boeing and is not Invalid Under the Commerce and Due Process Clauses of the Federal Constitution.**

1. *General Motors, supra, and Norton, supra, uphold the power of the destination state to impose a local privilege tax on a seller measured by gross receipts from interstate sales if the activities of the seller in the destination state constitute local taxable incidents and the destination state, as a result of these localized activities, bears a special relation to the interstate sales, and the localized activities are decisive factors which permit the seller to establish and maintain a market in the destination state for the sales.*

As stated by this court in *General Motors, supra*:

> "We start with the proposition that '[i]t was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business' *Western Livestock v Bureau of Revenue*, 303 US 250, 254. * * * 'Even interstate business must pay its way,' *Postal Telegraph-Cable Co. v Richmond*, 249 US 252, 259 * * * as is evi-



> denced by numerous opinions of this court." (377 U.S. 436, 439)[1]

In requiring interstate businesses to pay their way in reference to a tax imposed on or measured by gross receipts, this court noted in *General Motors, supra*:

> "A careful analysis of the cases in this field teaches that *the validity of the tax rests upon whether the state is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation.* For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the state has exerted its power in proper proportion to appellant's activities within the state and to appellant's consequent enjoyment of the opportunities and protections which the state has afforded. Where, as in the instant case, the taxing state is not the domiciliary state, *we look to the taxpayer's business activities within the state, i.e., the local incidents, to determine if the gross receipts from the sales therein may be fairly related to those activities.* As was said in Wisconsin v J. C. Penney Co., 311 US 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.' " (377 U.S. 436, 440, 441)
>
> * * * *
>
> " 'It is beyond dispute,' we said in Northwestern States Portland Cement Co. v Minnesota, supra, 358 US at 548, 'that a state may not lay a tax

[1] As indicated at pages 47-49, *infra*, cases such as *Gwin, White and Prince, Inc. v. Henneford, supra*, 305 U.S. 434 (1939), *Freeman v. Hewitt, supra*, 329 U.S. 249 (1946), *Adams Manufacturing Co. v. Storen, supra*, 304 U.S. 307 (1938) and *Evco v. Jones, supra*, 409 U.S. 91 (1972), establish that under the multiple burdens test the states of Pennsylvania and California (the origin states of the sales in question) could not impose such a gross receipts tax in Standard's wholesaling activities.

on the "privilege" of engaging in interstate commerce.' But that is not this case. To so contend here is to overlook a long line of cases of this court holding that an in-state activity may be a sufficient local incident upon which a tax may be based. As was said in Spector Motor Service, Inc. v. O'Connor, 340 US 602, 609 (1951), '[t]he state is not precluded from imposing taxes upon other activities or aspects of this [interstate] business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the state.' This is exactly what Washington seeks to do here and we cannot say that the appellant has shown that its activities within the state are not such incidents as the state can reach. Norton Co. v Dept. of Revenue, supra, 340 US at 537," (377 U.S. at 436, 446-447. Emphasis added.)

Thus, our inquiry at this point is to determine if the Washington B&O wholesaling tax in the instant case is imposed on Standard's business activities within Washington which are fairly related to its wholesale sales to Boeing to which Washington bears a special relation.

As heretofore indicated, the tax in question is the same tax before this court in the *General Motors* case. This Court there recognized that the tax was "imposed upon the privilege of engaging in business activities within the state" (377 U.S. at 437) and quoted in footnote 1 the applicable statutory framework under which the tax in question is imposed. As there indicated, the tax is imposed on persons "engaging within this state in the business of making sales at wholesale * * * equal to the gross pro-



ceeds of sales of such business." In construing the incidence of the tax under the facts and circumstances involved in *General Motors, supra*, this Court concluded:

"* * * The tax is levied on the incidents of a substantial local business in Washington and is constitutionally valid." (377 U.S. at 439)

As indicated by the Supreme Court of Washington in *Fibreboard Paper Products Corp. v. State*, 66 Wn.2d 87, 401 P.2d 623 (1965):

"* * * It is the situs of wholesaling, * * * that governs the tax on wholesaling. "The tax imposed here is a tax not on a thing but on an activity—a tax on the wholesaling activity within the state *measured by the gross proceeds from the activity.*"

There can thus be little question about the operating incidence of the tax in question. Under the Washington statute tax liability is predicated on the fact that Standard did engage in local wholesaling business activities in Washington for the period in question. (While it is not in the record, this Court may wish to take judicial notice of the fact that Standard, as shown by a public document on file with the Washington Secretary of State, attached hereto as "addendum A", was qualified as a foreign corporation to conduct an intrastate business in Washington for the period in question.) The fact that this local business was associated with its sales of products in interstate commerce does not convert the tax to one imposed on the privilege of engaging in interstate commerce precluded by *Spector Motor Service*,

*Inc. v. O'Connor*, 340 U.S. 602 (1951). The only question is whether or not the incidence of the tax and its measurement by wholesale sales to Boeing is supportable by the nature and extent of Standard's activities in this state.

In resolving this question, once a taxpayer has entered the state and carried on activities therein, the tax is properly imposed on local incidents measured by gross receipts from interstate sales if the taxpayer has exploited the market by performing substantial local services in relation to the establishment and maintenance of the sales by which the tax is measured. The test in determining whether such local services are "substantial" is whether the local activities are decisive factors in establishing and holding the market for the sales by which the tax is measured. *Norton, supra; General Motors, supra.* For purposes of due process, this is the degree of exploitive activity necessary to establish the "minimum connection", *Miller Bros. Co. v. Maryland, supra*, between the state and the person or transaction it seeks to tax consistent with "traditional notions of fair play and substantial justice." *Milliken v. Meyer, supra.*

In the language of *General Motors*, once a taxpayer carries on significant local activities within the state, the question of validity of a privilege tax on those activities measured by gross receipts is whether or not such local activities "* * * form some definite link, some minimal connection, between



a state and the person, property or transaction it seeks to tax." *General Motors, supra*, 377 U.S. 436, 448 quoting from *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). In applying the definite link or minimal connection test in *General Motors, supra*, the Court, after setting forth the general principles applicable and reciting facts pertaining to General Motors' activities in Washington, concluded:

> "* * * we can only 'conclude that, in the light of all the evidence, the judgment attributing * * * [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered * * * [through in-state activity] were not decisive factors in establishing and holding this market.'" 377 U.S. at 448, (Material quoted by the Supreme Court was from *Norton Co., supra*, at 340 U.S. at 538)*

Inasmuch as the facts establish that Standard came into the state of Washington to do a local business in connection with its wholesale sales and that this activity is clearly associated with its wholesale sales in this state, *Norton* and *General Motors* are dispositive of this case and establish the correctness of the decision of the Court of Appeals. These cases indicate there is no merit to either Standard's Due Process or Commerce Clause arguments.

It was the independent judgment of the two administrative and two judicial tribunals below that

*In the language of *Norton*:
"But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissoci-

the local activities of Standard were decisive factors in establishing and holding the Washington market for the sales by which the tax in question was measured. We turn now to an examination of the facts on record in order to demonstrate that the holding of the tribunals below was "within the realm of permissible judgment." *Norton, supra*, 340 U.S. at 538; *General Motors, supra*, 377 U.S. at 448.

The sales which constitute the measure of the tax in question consist of wholesale sales of highly specialized aerospace fasteners (e.g., nuts and bolts) manufactured by Standard in Pennsylvania and California and delivered to Boeing in Seattle. Standard during the relevant time period continuously maintained a resident "sales engineer" (Martinson) in Washington who devoted full time to servicing its buyer-seller relationship with Boeing.

It is the *effect* of this in-state activity and that of visiting personnel which is controlling here. *General Motors Corp. v. Washington*, 60 Wn.2d 862, 874, 376 P.2d 843 (1962), aff'd 377 U.S. 436 (1964). Viewed in the context of the nature of the product and the requirements of the purchaser, it is clear that the effect of Martinson's local activities and that of visiting personnel was to enable Standard to qualify as a Boeing supplier, and hence to make sales in Washington. As Martinson himself stated, Boeing

ated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." (340 U.S. at 537)



will not purchase any products without first conducting "qualification" tests of the product. (This is especially true with respect to the highly sophisticated fasteners used to hold Boeing's airplanes together.) Martinson spent 80 to 90 percent of his time in the Seattle area, where the qualification tests were made, talking with Boeing engineers, obtaining engineering drawings for products and doing whatever was necessary to ensure that Standard's products passed the qualification tests. It is apparent that Martinson's face-to-face contact with Boeing's engineers, and on-the-job monitoring of Standard's products undergoing qualification tests were decisive factors in enabling Standard to "qualify" as a Boeing supplier. Martinson could always be reached by a local telephone, and was immediately available to view first hand any problems arising in the qualification process. His employer obviously thought this physical presence in Washington was necessary to the successful qualification of its products; otherwise only out-of-state employees would have been used. In short, the record abundantly supports the conclusion that *but for* Martinson's in-state activities, Standard could not have sold a single nut, bolt, or rivet to Boeing. If this is not a *decisive factor* in establishing and maintaining these sales, one would be hard pressed to imagine what type of activity could be.

In addition to Martinson's activities in the "qualification process", he also devoted a portion of

his time to "problem solving" or "troubleshooting". Again, this required his immediate face-to-face availability to Boeing's engineers in order that he might discuss the problem with them, view for himself the nature of the particular problem, and, after a solution had been worked out by Standard's engineers, present the solution to Boeing engineers in a face-to-face meeting (A. 83). Standard also sent its engineers into Washington on a regular and systematic basis to meet with Boeing's engineers in respect to the use of its products by Boeing. Martinson arranged these meetings, and presumably problems related to the use of Standard's products were discussed and resolved. Certainly this was a decisive factor in enabling Standard to maintain Boeing as a customer.

Finally, Martinson performed the traditional outside salesman's duties of "scouting the market" and maintaining personal contact with customers for purposes of promoting rapport and goodwill. Exhibits A, B, and D, comprising correspondence between Martinson and his "sales manager" relating to potential users of aerospace fasteners, and Exhibit L, relating to prices and terms of Standard's competitors for the Boeing market, clearly fall within the traditional "scouting the market" function of an outside salesman. His activities with respect to arranging for a "hospitality room" at an aerospace engineering convention (Ex. C), and taking care of "visiting firemen" (A. 84) from Standard also



clearly fall within an outside salesman's traditional duties.

If these facts do not establish that Washington, as the market state, did not bear a special relationship to Standard's wholesaling activities in reference to the sales in question, it is hard to conceive what constitutes a special relationship. Furthermore, if these activities were not decisive factors in Standard's ability to establish and hold Boeing as a market for its wholesale sales, it is difficult to conceive what would constitute such factors. Not only were Standard's activities in Washington fairly related to its Washington wholesale business; they were absolutely essential and necessary in order for it to sell its products at wholesale to Boeing. It could not have conducted the necessary tests and obtained the necessary information to sell Boeing its products without these continuous and systematic in-state activities. Its in-state activities (local incidents) were specifically and unequivocally related to Boeing sales. There is thus no question about the special relation of Standard's activities in this state to its Washington wholesale sales.

The wholesale sales promotional effort of General Motors employees in Washington in regard to the wholesale sales there in question[9] is not distin-

[9]The promotional nature of General Motors activities in Washington concerning the exempt sales is appropriately characterized as follows in *General Motors Corp. v. State*, 60 Wn.2d 862, 875:

"All of these activities are related to sales of General Motors in the sense that they tend to strengthen dealer representation and stimulate consumer demand. Because of the very nature of the activities, it cannot be said that General Motors directly partici-

guishable from Standard's Washington activities which were conducted for the purpose of promoting its wholesale sales to Boeing.

In both *General Motors* and the case at bar, in-state activities pertaining to claimed exempt wholesale transactions were not directly related to obtaining and processing orders. The record in this cause, except for the acceptance of orders outside the state, is silent as to where and how the sales were negotiated and other terms and conditions of the sales including the place of acceptance of the products by Boeing. In *General Motors, supra*, the orders were accepted in Portland or at the factory and the products were shipped f.o.b. factory. *General Motors, supra*, 377 U.S. 436, 443.

Inasmuch as there is no substantive difference between Standard's activities in Washington concerning its wholesale sales to Boeing and the activities in Washington concerning the sales in question in *General Motors, supra, General Motors* is controlling precedent here.

2. *Contrary to Standard's argument, the activities of the Norton engineers in Norton, supra, are not comparable to those of Martinson in the instant case and were not shown to be related to Norton's direct interstate sales; therefore, Norton, supra, does not*

pates in particular retail sales. Yet the activities undeniably have a very great effect in terms of increasing total retail sales in Washington, thereby increasing also wholesale sales. All of the transactions measured by the tax imposed on these activities are in some degree affected by General Motors organized promotional effort."



*support Standard's claim of tax immunity for the wholesale sales in question.*

In a further effort to distinguish the *General Motors* case, *supra*, Standard relies heavily on this court's holding in the *Norton* case, *supra*, that the direct interstate sales of Norton, which were disassociated from the local outlet of Norton, were not subject to the Illinois Retailers Occupation Tax. Standard argues that Norton engineers performed the same activities in Illinois in regard to the exempt sales that its employees performed in Washington in regard to Boeing sales in question. Standard then concludes that the *Norton* case, *supra*, is direct precedent for its claimed exemption in the case at bar. This argument is fallacious for three reasons. First, there is nothing in the *Norton* record or in this court's decision in *Norton* that associated the Norton engineers' activities in Illinois with the exempt sales. Secondly, Standard's Washington activities are not comparable to the Illinois activities of the Norton engineers. Thirdly, if the Norton enginers' Illinois activities were associated with the exempt sales and were necessary in order for Norton to establish and maintain the Illinois market for these sales, the exemption of these sales in *Norton* would conflict with the basic rationale of the *Norton* decision.

The only reference to Norton's engineers in *Norton, supra*, is the following:

"* * * But no solicitors work the territory out of either the home office or the Chicago branch, although petitioner will supply engi-

neering and technical advice. * * *" (340 U.S. at 537)

We have examined the record in the *Norton* case. There is nothing in the record to indicate that Norton's engineers who worked out of the Chicago office had anything to do with the sales found to be exempt in *Norton*. The only evidence in the record in the *Norton* case concerning engineering activities was the following testimony set out on page 20 of the transcript of record, concerning activities out of the Chicago office of Norton:

> "* * * we have abrasive enginers who go out to the customer and advise him on technicalities of grinding wheels, what wheels would perform the work, etc.; the engineers go in the field after the order is in; they do not solicit; it is just technical advice; we have no men in the field from the Chicago office taking orders; * * *"

The Supreme Court of Illinois in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) in reference to the engineers stated:

> "There are no salesmen used by appellant, but it does have a group of engineers *available to consult* with prospective customers on their needs. These engineers do not solicit or take orders for goods." (Emphasis added)

There is no evidence or judicial statement in *Norton* that associated the Norton engineers' activities with any exempt sales in *Norton*.

Since this Court held in Norton that any exempt sales must be disassociated from local activities, this Court must have predicated its decision in *Norton*



concerning exempt sales on the premise that the activities of Norton engineers were not significantly or directly associated with the exempt sales.[10] Furthermore, the engineers involved in Standard's sales to Boeing visited the state. Martinson's activities in Washington were not the activities of an engineer. Standard in its brief consistently characterizes Mr. Martinson as an "engineer" solely to lend credence to its argument that the activities of Martinson were the same as the activities of the engineers in *Norton*, *supra*. Martinson was essentially a salesman. He had a degree in animal husbandry and no formal training in engineering; his supervisor was the sales manager; and Martinson referred to himself as one of the "outside people" (A. 84), an obvious reference to the "outside sales" department maintained by Standard.[11] (Ex. A)

Under these circumstances, it is error for Standard to argue, on authority of *Norton*, that its Washington activities are inadequate (i) to establish nexus (Washington jurisdiction to impose its B&O tax on Standard's Washington wholesale activities)

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[10] For a proper interpretation of the facts and holding in *Norton*, the dissenting opinion of Mr. Justice Clark is instructive. He concluded that the direct sales (the interstate sales which did not involve the Chicago outlet) under the test laid down by the Court in *Norton* should also be taxable because the taxpayer had not established that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market for Norton's direct sales. Obviously, a majority of the court thought otherwise.

[11] In intracompany correspondence to the sales manager, Martinson stated "Let's go after this market and prove to ourselves that SPS [Standard Pressed Steel] can market a new product!" (Ex. D) This is sales talk, not engineering talk.

or (ii) to permit the tax in question to be measured by gross receipts derived from Boeing within the purview of the Commerce Clause limitations.

3. *Contrary to Standard's argument, it did engage in a local business in Washington of making wholesale sales; its Washington activities pertaining to this business were not de minimis; and all the necessary incidents of this business did not take place outside of Washington.*

In yet further efforts to distinguish *General Motors, supra*, from the case at bar, Standard argues (i) that its activities in this state are *de minimis*; (ii) that all of the necessary and material incidents of its wholesale activities took place outside Washington; and (iii) that it has not elected to compete as a local business. These arguments are completely refuted by the record in this cause and are based entirely on Standard's failure to recognize that the important consideration is not where the mechanics of sales are performed. In *General Motors, supra*, all the mechanical aspects of the wholesale sales of General Motors to its Washington retail dealers occurred outside the state of Washington. However, the Supreme Court of Washington and this Court on appeal found that the substance of General Motors' wholesale sales to its Washington dealers occurred in Washington where its customers were located and where the demand for the manufactured products existed, to a very large degree, as a result of General Motors' promotional activities. The important question is to determine the place of performance of the *sales activities*. The tax in question is imposed on Standard's wholesaling sales activities. The substance of the wholesale sales activity of Standard related to its sales to Boeing in Washington took place in Washington. The record discloses no out-of-state activity of Standard to effect these sales except for the mechanics of filling the orders. Thus, there is absolutely no basis for Standard to argue that it carried on only a *de minimis* part of its wholesaling activities in this state in reference to its sales to Boeing. The only incident of sale which the record clearly shows occurred outside of the state was the acceptance of the order. There is no indication where the negotiations took place; where title to the goods passed; whether the delivery terms were f.o.b. California, Pennsylvania, or Washington. On the other hand, it is clear that all the activities which enabled Standard to make sales to Boeing in the first place took place entirely within Washington. The six activities carried on in this state by Martinson were found as a matter of fact to be decisive in establishing and maintaining the market for Standard's sales to Boeing (A. 17, 27, 37). It is abundantly clear that *but for* the activities of Martinson in ensuring that Standard was a "qualified supplier" to Boeing, Standard could not have sold a single nut, bolt, or rivet in the state of Washington. Under these circumstances it is inconceivable that Standard would argue that all the necessary and material in-

cidents of its wholesale sales to Boeing took place outside of Washington.

Equally untenable is Standard's argument that it has not elected to compete as a local business, but rather is viewed by its customers (Boeing) as remote and inaccessible and therefore the tax is on the privilege of conducting a purely interstate business in violation of the Commerce Clause (citing *Norton Co. v. Department of Revenue*, 340 U.S. 534). The record simply does not substantiate this; rather it clearly establishes that Standard for the period in question elected to compete as a local business and was not viewed by Boeing as remote and inaccessible. Although Boeing dealt with out-of-state employees of Standard, as did General Motors' dealers in the *General Motors* case, for purposes of completing the mechanics of the sales transactions, all the necessary incidents preparatory to making the sales were distinctly localized in Washington. Standard could be served with process in Washington; its local sales representative could be reached by a local telephone call; the sales representative maintained face-to-face contact with Boeing's employees on virtually a daily basis; its out-of-state engineers visited the state and engaged in face-to-face conferences with Boeing employees in a regular and systematic manner. In short, the substance of Standard's wholesaling activity concerning its Boeing sales took place in Washington and nowhere else. There is absolutely nothing in the record to show that Standard



conducted any substantial wholesaling activity in reference to its Washington sales to Boeing except in the state of Washington. Furthermore there is no evidence in the record that Standard suffered any sort of competitive disadvantage over a local business by reason of conducting the mechanics of its sales to Boeing over the telephone or by use of the U. S. mail. Taken in its entirety, the record abundantly supports the conclusion of the lower court that Standard engaged in substantial local business with respect to making wholesale sales to Boeing.

4. *The Washington Wholesaling Business and Occupation Tax does not subject Standard to the risk of multiple tax burdens on its wholesale sales of products delivered in Washington to Boeing and this Court will not pass on this question as an abstract proposition.*

Standard would have this Court find, as an abstract proposition, that imposition of the tax in question would subject it to a risk of multiple tax burdens. There is not a scintilla of evidence to support Standard's contention that either California or Pennsylvania did or can tax the gross receipts from the wholesale sales in question. The record does not establish what sales activities associated with Standard's wholesale sales to Boeing actually took place in either California or Pennsylvania. There is no showing of how or where the sales were negotiated or consummated. Under these circumstances, this Court has consistently refused to pass on this question.

In *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959), a case dealing with an apportioned net income tax as applied to a foreign corporation, the Court stated at page 463:

> There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case, the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do.

*General Motors Corp. v. Washington*, 377 U.S. 436 (1964), cites *Northwestern States Portland Cement Company v. Minnesota, supra*, with approval, and goes on to say at page 449:

> [Appellant] has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipment by which Washington measures its tax. And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of "multiple taxation", and we adhere to that position. (Citations omitted.)

In the instant case, since Standard has failed to show that the gross receipts in question are subject to tax by any state other than Washington, it asks this court to "deal in abstractions", and therefore has not properly presented a multiple burden question.[12] Furthermore, under applicable case law, the

[12]The court below, on authority of *General Motors Corp. v. Washington, supra*, stated that "• • • [T]he burden is upon the taxpayer to affirmatively show that its activities are subject to taxation elsewhere. • • • In this case we find no such affirmative showing other than the unsupported assertion in plaintiff's appellate brief that a multiple burden has been created." (Citation omitted.)



state of origin may not impose a gross receipts tax on these wholesaling activities; and thus even as an "abstract" matter, no multiple burdens could arise.

Standard cites *Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), and *Freeman v. Hewit*, 329 U.S. 249 (1946), to support its argument that Pennsylvania and California can tax its sales to Boeing. These cases do not support this argument. To the contrary, they invalidated the taxes there imposed by the states of *origin* on sales in interstate commerce.

*Gwin, White and Prince, Inc. v. Henneford, supra*, simply holds that a tax imposed on in-state activities, which is measured by receipts from both in-state and out-of-state sales, is unconstitutional, because such a tax exposes interstate commerce to a risk of multiple tax burdens. In that case, the state of the *seller* was imposing a tax measured by receipts from out-of-state sales as well as in-state sales. In *Freeman v. Hewit, supra*, this Court invalidated the Indiana gross income tax on gross receipts derived by an Indiana *seller* from sales consummated out-of-state on the New York Stock Exchange. Again, in *Adams Manufacturing Company v. Storen, supra*, 304 U.S. 307 (1938), this Court refused to uphold Indiana's gross income tax on gross receipts derived by an Indiana manufacturer's sales to out-of-state destinations.

The principle that a state of origin cannot impose an unapportioned tax on or measured by gross

receipts from interstate sales was reaffirmed in *Evco v. Jones*, 409 U.S. 91 (1972), on authority of *Adams Manufacturing Company v. Storen*, *supra*, and *Gwin, White and Prince, Inc. v. Henneford*, *supra*. Significantly, the vice sought to be avoided by these decisions, namely, multiple state tax burdens on gross receipts from interstate sales, would not have been present if this Court had not recognized the power of the destination state to impose a tax on or measured by gross receipts from interstate sales. We are aware of no case and Standard cites none which denies the destination state the power to tax by application of the multiple burden test.

Alternatively, where the destination state has imposed a tax on or measured by receipts from sales of goods originating in other states, and there is sufficient local activity to establish jurisdiction to tax, this Court has upheld the tax. *General Motors Corporation v. Washington*, *supra*, 377 U.S. 436 (1964); *Field Enterprises, Inc. v. Washington*, 47 Wn.2d 852, 289 P.2d 1010 aff'd per curiam, 352 U.S. 806 (1956); *Norton Company v. Department of Revenue*, 340 U.S. 534 (1951); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1939). This is the method of taxation Washington has chosen to follow. (The *General Motors* and *Field Enterprises* cases involved the same tax which is challenged in the case at bar.)

The thrust of the decisions of this Court is to uphold taxation by the destination state and deny that



of the origin state. Standard asks this Court to reverse these decisions which uphold taxation by the destination state and in substance hold that the destination state cannot impose a tax on or measured by gross receipts if, as an abstract proposition, it can be argued that there is sufficient nexus in the state of origin to support such a tax. The same abstract argument is also valid to deny the state of origin the power to impose a tax on or measured by gross receipts if there is sufficient nexus in the state of destination to support such a tax. Thus, if this Court were to adopt Standard's multiple burden argument, neither the states of origin (California and Pennsylvania) nor the state of destination (Washington) of Standard's Washington sales to Boeing would have the power to impose a tax on or measured by Standard's gross receipts from Standard's Washington sales to Boeing. This is contrary to the holdings of this Court that interstate commerce must pay its own way. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938), *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252 (1919), *General Motors Corp. v. Washington*, *supra*.

In order to avoid multiple taxation of interstate sales transactions and require interstate commerce to pay its own way, when the state of destination has sufficient nexus to support a tax imposed on or measured by the receipts of interstate sales, this Court has consistently upheld the destination state's taxing power, and struck down that of the origin state.

Inasmuch as the state of destination provides the market for interstate sales and is the state which is more directly involved in furnishing the interstate seller substantial benefits and opportunities to establish and enforce its legal rights against the in-state purchaser, it is logical and fair that the state of destination rather than the state of origin be granted the power to impose a tax on or measured by receipts from interstate sales. So long as only the state of destination is allowed by this Court to impose a tax on or measure a tax by gross receipts from interstate sales, no risk of multiple burden exists.

In the case at bar, Washington is the state of destination of Standard's sales to Boeing. Sufficient nexus exists to support Washington's business and occupation tax on Standard's sales within the state. (Infra, pp. 21-27). Thus, it follows that Washington is the only state which can, consistently with this Court's decisions, impose a tax measured by Standard's sales to Washington customers.[13] A risk of a multiple tax burden patently does not exist.

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[13] "In conformity to this Court's decisions, Washington does not include gross receipts from wholesale sales consummated by delivery outside the state in the measure of the business and occupation tax in question. Washington Administrative Code 458-20-193A, which is given the force and effect of law by RCW 82.32.300, provides that

"Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither Retailing nor Wholesaling business tax is applicable."

The Washington Supreme Court recognized, in *Crown Zellerbach v. State*, 45 Wn.2d 749 (1954), at 755, that this portion of the rule is constitutionally mandated by this Court's holding in *Freeman v. Hewit*, 329 U.S. 249 (1946).



## CONCLUSION

Once again this Court has been called upon to pass on the constitutionality, under the Due Process and Commerce Clauses, of the Washington business and occupation tax imposed on the privilege of engaging in the business of making sales at wholesale within the state. It should be apparent that there are no constitutional objections to the tax as imposed on the local wholesaling activities of Standard, and therefore this Court should affirm the holding of the courts below.

First, it is beyond doubt that Standard has entered the state and exploited the local market by means of out-of-state employees visiting the state on a regular and systematic basis, and by means of maintaining a resident sales employee operating out of an office in his home maintaining continuous face-to-face contact with Standard's only significant customer in the state. Implicit in the entry of a foreign corporation in this manner is the understanding that it is entirely consistent with due process to require the foreign corporation to bear part of the cost of maintaining the market which the state provides, and which the foreign corporation effectively exploits by reason of its local activities. *Wisconsin v. J. C. Penney*, 311 U.S. 435 (1940). This is not a case of "mere entry", nor of *de minimis* activity; rather it is a case of continuous and systematic activity in the taxing state directly related to the sales which are the measure of the tax.

Second, once a foreign corporation has entered the state and engaged in substantial local activities, in order to avoid liability for tax it has the burden to disassociate its local activities from the sales which comprise the measure of the tax. *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). It is clear that Standard has wholly failed to meet this burden. The judgment of the Washington Court of Appeals (and three lower tribunals) that Standard's in-state activities were decisive factors in establishing and maintaining the local market for its sales in Washington is supported by substantial evidence and is clearly within the realm of permissible judgment. There is absolutely no indication that the activities of the engineers in *Norton* had anything to do with the *Norton* exempt sales, and Standard's attempt to equate the activities of its resident "sales engineer" with the activities of the *Norton* engineers is without foundation in fact or law.

Third, Standard has not met the requirement of establishing that the tax in question results in a multiple tax burden. There has been no showing that any substantial sales activity took place in Pennsylvania or California, so as to permit those states to impose a tax on the privilege of engaging in the business of making wholesale sales. In resolving the multiple tax burden question this Court has refused to deal in abstractions. *General Motors*, *supra*. Furthermore, in every case where a state's power



to tax receipts from interstate sales has been in question, this Court has upheld the destination state's power, *McGoldrick v. Berwind White Coal Mining Co.*, *supra*, 309 U.S. 33 (1939); *Norton*, *supra*; *General Motors*, *supra*; and denied the origin state's power, *Freeman v. Hewit*, *supra*, 326 U.S. 249 (1946); *Evco v. Jones*, *supra*, 409 U.S. 91 (1972).

Finally, it should be apparent from an examination of the record in this case that the wholesaling activities of Standard are indistinguishable for constitutional purposes from the in-state activities carried on by General Motors' sales personnel, and provide an adequate basis for assessment of the tax in question. For this court to hold otherwise would be a retreat from the policy underlying the *General Motors* decision—namely, that barring problems of insufficient nexus, discrimination, or multiple burdens, interstate commerce must pay its way—and would result in a return to the long discarded notion that interstate commerce may not be taxed at all.

For the foregoing reasons, the judgment of the Washington Court of Appeals should be affirmed.

Respectfully submitted,

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Addendum A

# STATE OF WASHINGTON | DEPARTMENT OF STATE

I, **A. LUDLOW KRAMER**, Secretary of State of the State of Washington and custodian of its seal, hereby certify that according to the records on file in my office **STANDARD PRESSED STEEL CO.**, **a Pennsylvania corporation, qualified to do business in this state as a foreign corporation on February 23, 1960; and I further certify that the above named corporation is in good standing with all annual license fees paid to July 1, 1975.**

In witness whereof I have signed and have affixed the seal of the State of Washington to this certificate at Olympia, the State Capitol,

**August 16, 1974**

A. LUDLOW KRAMER
SECRETARY OF STATE

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